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No. 05-

IN THE

Supreme Court of the United States

SALLIE B. HOLLOWAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether 28 U.S.C. § 1500 is unconstitutional as it denies plaintiffs a forum to litigate their claims against the United States when the amount at issue exceeds $10,000 and the claim requires declaratory relief?

Is the statute of limitations for the United States Court of Federal Claims found at 28 U.S.C § 2501 subject to equitable tolling when the plaintiff has actively pursued declaratory relief in other forums, when she timely filed her claim in the claims court but voluntarily dismissed due to 28 U.S.C. § 1500, when she promptly re-filed her claim after being notified of the United States Supreme Court's denial of certiorari, but where such notification occurred after the statute of limitations found in 28 U.S.C. § 2501 had expired?

PARTIES TO THE PROCEEDING

Petitioner is Sallie Holloway (hereinafter "Holloway") who is a Naval Reserve Officer, presently serving at the rank of Captain (pay grade 0-6) in the active Reserve and who was on active duty in the United States Navy as a Reserve Officer at the rank of Commander (pay grade 0-5) when released from active duty to the active Reserves. She filed her original claim in the Court of Federal Claims in December of 2002. Holloway refilled this claim in August of 2003. She appealed dismissal of her claim to the Court of Appeals for the Federal Circuit. In related actions, Holloway filed suit in United States District Court, appealed that Court's denial to the United States Court of Appeals for the Ninth Circuit, and petitioned for certiorari in this Court following the affirmance by the Ninth Circuit of dismissal in the U.S. District Court.

Respondent United States is the proper party under United States Court of Federal Claims jurisdiction found in 28 U.S.C. § 2491 and was the Respondent on appeal in the United States Court of Appeals for the Federal Circuit.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The United States Supreme Court prior denial of certiorari in No. 02-1216 is reported at 539 U.S. 960 (2003). The Federal Circuit opinion (App. A) is unreported. The decision of the United States Court of Claims (App. B) is reported at 60 Fed. Cl. 254 (2004). The Ninth Circuit opinion, the Opinion of the U.S. District Court for the Northern District of California, the Ninth Circuit Opinion On Rehearing *En Banc* are all unreported and are contained in the Appendix to the above Number of this Court in a prior petition for certiorari.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on May 9, 2005.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUIONAL, STATUTORY, COURT RULE, AND REGULATORY PROVISIONS INVOLVED

Constitution:

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Statutes:

5 U.S.C. § 702 provides in pertinent part:

> A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof . . .

10 U.S.C. § 1293n., entitled: "Twenty years or more: warrant officers" provides in pertinent part (as to Navy):

> n. (b)(2) During the active force drawdown period, the Secretary of the Navy may—
>
> > (A) apply the provision of section 6323 of such title [section 6323 of this title], to an officer with at least 15 but less than 20 years of service. . . .

10 U.S.C. § 1552 provides in pertinent part:

> (a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice . . . acting through boards of civilians of the executive part of that military department.

10 U.S.C. § 12313(a) provides:

> Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty.

10 U.S.C. § 12731a(c) provides:

> (1) The Secretary concerned may limit the applicability of subsection (a) to any category of personnel defined by the Secretary in order to meet a need of the armed force under the jurisdiction of the Secretary to reduce the number of members in certain grades, the number of members who have completed a certain number of years of service, or the number of members who possess certain military skills or are serving in designated competitive categories.

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 1491 provides in pertinent part:

> (a)(1) The United States Court of Federal Claims shall have jurisdiction to render any judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department. . . .

28 U.S.C. § 1500 provides in pertinent part:

> The United States Court of Federal Claims shall not have jurisdiction of any claim . . . to which the plaintiff . . . has pending in any other court any suit or process against the United States . . .

28 U.S.C. § 1631 provides in pertinent part:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal . . . is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was

filed or noticed and the action or appeal shall proceed as if it had been filed or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 2201 provides in pertinent part:

> (a) In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202 provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. § 2401 provides in pertinent part:

> (2) . . . every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability . . . may be commenced within three years after the disability ceases.

28 U.S.C. § 2501 provides in pertinent part:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues . . .

Regulations:

See Appendix (C) attached.

Rules:

Supreme Court Rule 16.3 provides in pertinent part:

> [w]henever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record . . .

STATEMENT OF THE CASE

The facts asserted for certiorari in this Court under NO. 02-1612 are as follows: Holloway was a Navy Commander in Reserve status on active duty in the U. S. Navy serving in what is referred to as a "Canvasser Recruiter" prior to her release from active duty on July 1, 1997. She has been promoted to Captain subsequently while in active Reserve status. The Navy had implemented a program pursuant to statute entitled "Temporary Early Retirement Authority" ("TERA"), and Holloway had met all the requirements of the implementing statute applicable to Reserves on active duty.[1] Holloway applied for TERA to both Navy administrative authorities and then to the Board for Correction of Naval Records ("BCNR"), but said application was denied by both authorities, the first while she was on active duty, and the second by the BCNR on 26 October 1999. Naval authorities opined that while all other categories of Reserves on extended active duty were eligible for TERA, those as Canvasser Recruiters were not.

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1. The regulation cited in Appendix e herein does not cite to the statute which applies to implement TERA whether it be this statute as to Reserves generally or to 10 U.S.C. § 1293n. above. Holloway is a Reservist and 10 U.S.C. § 12731a above should apply, both for this reason as well as interpreting fairly what is meant by this statute in relation to the Reserve Personnel Management Act as a whole, of which § 12731a is a part.

Before certiorari was denied, on December 3, 2003, Holloway filed her claim in the United States Court of Federal Claims in order to comply with 28 U.S.C. § 2501 (this was while her case was pending review *en banc* in the Ninth Circuit). The Court of Federal Claims, per Judge Hodges, cited to 28 U.S.C. § 1500, but also indicated that the Court had jurisdiction to review a decision by the Navy Board for Correction of Military Records. Holloway took a voluntary dismissal in view of 28 U.S.C. § 1500 and Judge Hodges Order. After decision *en banc* by the Ninth Circuit, Holloway filed her original petition for certiorari in this Court on April 30, 2003.

Following denial of certiorari on June 27, 2003, and receipt of same late in July of 2003, Holloway re-filed her claim in the United States Court of Federal Claims on August 4, 2003 asserting review under the Court of Federal Claims jurisdiction and review of the Navy Board for Correction of Military Records ("BCNR") which was dated October 26, 1999. Per Judge Block, the Court of Federal Claims dismissed Holloway's claim on April 26, 2004. Holloway filed her appeal in the Court of Appeals for the Federal Circuit on June 15, 2004 and that Court entered its decision and order on May 9, 2005.

REASONS FOR GRANTING THE PETITION

I. 28 U.S.C. § 1500 is unconstitutional because it denies plaintiffs a forum in which to litigate all available claims against the United States.

A. Policy

Holloway relies on the Fifth Amendment to the United States Constitution, stating in relevant part that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

B. Relevant Statutes

28 U.S.C. § 1500

In relevant part, 28 U.S.C. § 1500 provides that:

> The United States Court of Federal Claims shall not have jurisdiction of any claim . . . to which the plaintiff . . . has pending in any other court any suit or process against the United States . . .

28 U.S.C. § 2501

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues . . .

Recently, the Federal Circuit declined to address the constitutionality of 28 U.S.C. § 1500, holding that it was up to congress to make any changes to that statute. *Harbuck v. United States*, 378 F.3d 1324 (2004). While this Court has not passed on the constitutionality of 28 U.S.C. § 1500, Holloway now respectfully asks this Court to do just that. Holloway contends that her case squarely raises the constitutional problems inherent in this unfair law.

28 U.S.C. § 1500 is an old statute, adopted after the Civil War in response to the growing problem of those with federal contract claims bringing simultaneous suits against the government in both the Federal District Court and the Court of Claims. *Harbuck* at 1328. While the idea of preventing contractors with claims against the government from having two bites at the apple is a laudable one, in practice today, 28 U.S.C. § 1500 is often used to prevent legitimate claimants from having even a single bite at the apple.

Holloway presents just such a case. Holloway's cause of action stems from the Navy's arbitrary exclusion of Canvasser Recruiters from early retirement under TERA. However, prior claims court decisions where TERA was at issue stood in her way. In *Greek v. United States*, 44 Fed. Cl. 43 (Fed. Cl. 1999), the plaintiff was denied relief because the claim was barred by regulation. In *McMullen v. United States*, 50 Fed. Cl. 718 (Fed. Cl. 2001), the plaintiff was denied relief because the claim was held to be non-justiciable. Thus, in the Court of Federal Claims, Captain Holloway's case would have been dismissed under either *Greek* or *McMullen*.

Further, this Court's decisions in *United States v. King*, 395 U.S. 1 (1969) and *Testan v. United States*, 424 U.S. 392 (1976), led Holloway to believe that the Court of Federal Claims had no jurisdiction to grant declaratory relief to military personnel seeking TERA benefits. Knowing this, Holloway sought declaratory relief in Federal District Court to have the Navy's action reviewed (this was under the authority of *Turner v. Weinberger*, 728 F.2d 751 (C.A. 5, 1984), allowing mandamus when there was no declaratory jurisdiction in the claims court).

Fully aware that *Greek* and *McMullen* were binding precedent in the Court of Federal Claims, the district court boldly stated that Holloway should seek her remedy in that Court, *a forum that could not grant the declaratory remedy needed!*

See Order of the United States District Court for the Northern District of California, No. C-00-00981 SBA, Oct.18, 2000. Holloway appealed the order to the 9th Circuit, but that Court, declining to follow *Turner*, dismissed the claim without reaching the merits. Memorandum Decision of the United States Court of Appeals for the Ninth Circuit, No. 01-15616, Oct. 11, 2002. Holloway's petition for *en banc* review was denied without comment. Order of the United States Court of Appeals for the Ninth Circuit, No. 01-15616, Feb. 4, 2003.

At this point, to protect her claim, Holloway did two things. First, Holloway moved the 9th Circuit Court of Appeals to transfer the case to the Court of Federal Claims under the authority of 28 U.S.C. § 1631. This motion was denied.

Second, to protect against the running of the statute of limitations, Holloway filed suit in the Court of Federal Claims (Ct.Fed.Cl. No. 02-1773C). This suit was filed well before the limitation period expired. However, Holloway was forced to voluntarily withdraw the suit without prejudice because of 28 U.S.C. § 1500.

Thus, Holloway was in an impossible situation. She had a valid claim for relief, but the claims court and the district court each insisted that the other was the proper forum for the claim. The operation of 28 U.S.C. § 1500 had deprived her of a forum in which to litigate all of her claims.

It is well established that when the United States waives its sovereign immunity, it is subject to the laws in the same manner as any other litigant. *United States v. King*, *supra*. If this is so, it stands to reason that Congress must provide a forum in which such relief can be granted. *Franconia Associates v. United States*, 536 U.S. 129 (2002). Having established a right—such as the right to sue the government—Congress must afford a remedy. It cannot withhold with one hand what it has granted with the other.

Yet 28 U.S.C. § 1500 does precisely that. In a great many cases, particularly evident in the case at bar, the statute withholds the remedy granted by the government's waiver of sovereign immunity by denying a claimant access to a forum in which she can obtain complete relief from an *ultra vires* or unconstitutional act by a government agency.

The United States is a land governed by law. Agencies of the United States cannot, and must not, be allowed to operate by royal decree. Agencies must be subject to the law and their actions must not exceed their granted power or violate the constitution.

Under the Fifth Amendment's Due Process Clause, Sallie Holloway had a clear right to raise issues concerning the constitutional validity of the Navy's action in denying her retirement under TERA, and the government must grant her a forum in which to do so. Granting her that right but denying her any way to obtain relief denies her constitutional due process. Imposing the strictures of 28 U.S.C. § 1500 on Holloway without providing for mandatory transfer when one forum disclaims jurisdiction to act, then rules that the case must proceed in another forum, while the law limits the right to declaratory relief in the other forum, is just such a denial of due process.

28 U.S.C. § 1500 requires a plaintiff to navigate the deadly waters of conflicting forums whenever the claim depends on a determination of *ultra vires* or constitutional issues, and involves more than $10,000 in potential damages. 28 U.S.C. § 1500 denies these claimants their constitutional right to a remedy under the laws of the land.

Holloway contends that the Navy did not follow the law as enacted by Congress when it implemented its TERA regulations. As such, this action was an *ultra vires* act by the Navy. Agencies cannot act in this manner. The Navy must follow the laws

enacted by Congress and, if it does not do so, due process demands that the courts have the power to make the Navy follow the law. Again, having established a right, the law must afford a remedy. Some forum must have jurisdiction to afford that remedy.

The District Courts have only limited jurisdiction to decide claims against the United States—that limit being that the claim may not exceed $10,000. The Court of Federal Claims also has limited jurisdiction to decide claims against the United States—that limit being that it cannot grant declaratory relief. Simply stated, the Court of Federal Claims cannot decide a claim requiring a declaratory determination that an agency has exceeded its authority under a statute or has exceeded a constitutional limitation. Conversely, while the District Court can decide such matters, they cannot decide such a case where more than $10,000 is at issue. Thus, litigants like Holloway who have larger claims and require a finding that the agency action was *ultra vires* or unconstitutional have nowhere to turn.

In the past, this problem was dealt with by allowing free transfer between the appropriate District Court and the Court of Federal Claims and by staying the action in one while the other went forward. This was not litigating the same claim in two forums; this was litigating separate aspects of the claim in the forum having power to address the disparate aspects of the claim.

However, Congress repealed the statute formerly allowing free transfer of cases filed in the Court of Federal Claims to the District Courts. And in Holloway's case, the District Courts and the 9th Circuit both denied her motion to transfer, while the Court of Federal Claims denied her motion that that court retain jurisdiction. Neither court ever accepted jurisdiction of her claim or consented to address the merits of her claim. Captain Holloway was denied both her day in court and due process of law, a result that cannot be allowed under the Constitution.

In spite of the gamesmanship employed by the courts below to justify their actions in this case, the plain fact is that Captain Holloway has not been given her day in court. If 28 U.S.C. § 1500 demands this result, then 28 U.S.C. § 1500 is unconstitutional.

This Court cannot say, as so many courts have stated, that Congress must correct any infirmities in the statute. Congress did not merely create an unfair law; Congress created a law that has an unconstitutional impact on claimants like Sallie Holloway. Whenever a claim against the United States exceeds $10,000 and requires declaratory relief, there is no forum where this claim can be resolved. This Court can and must overturn a statute that violates the Constitution. *Marbury v. Madison*, 5 U.S. 137 (1803).

C. The Needed Remedy

This petition squarely places the constitutionality of 28 U.S.C. § 1500 at issue. However, even if this Court agrees with Captain Holloway that the statute is unconstitutional, she would need further relief in order to press her claim. This is because of the way that the various federal courts tangle and confuse the very different concepts of "justiciability" and subject matter jurisdiction.

Currently, the Ninth Circuit, U.S. District Court, and the Court of Federal Claims have all indicated that the concept of "justiciability" applies to the claims of reserve officers on active duty who want judicial review of the decision of a military correction board under 10 U.S.C. § 1552. But this does not take into account that each Court's review is limited to the same subject matter jurisdiction as the original correction board, which is "to correct error and remove injustice." But, no decision by this Court, or the Ninth Circuit, or the U.S. District Court, or the Court of Federal Claims has expressly held that judicial

review of a military correction board's decision removes the case from the concept of "justiciability." Captain Holloway addressed this problem in her earlier petition for certiorari, which this Court denied. *See* Petition for Certiorari #02-1612, styled *Holloway v. Johnson.*

This Court should now consider that earlier petition along with the current one and direct which court is the proper forum to hear her claim. To arrive at a just decision on the proper forum, this Court will likely require separate briefing apart from this petition, and such briefing will have to refer at length to the recent Federal Circuit case of *Fisher v. United States*, 364 F.3d 1372 (Fed. Cir. 2004), *superseded on reh'g*, 402 F.3d 1307 (Fed.Cir. 2005), 403 F.3d 1307 (Fed. Cir. 2005) (*en banc*), which addressed the procedures to be followed by the claims court in cases such as this, but such decision was not referred to by the Federal Circuit in Holloway's case in that Court. It should also be noted that the Federal Circuit's *en banc* opinion indicated that, as to jurisdiction, future opinions by the Supreme Court may clarify all of this. 402 F.3d *at* 1184.

Captain Holloway realizes that her case presents difficult procedural issues due to the unnecessary complexities of federal jurisdiction where declaratory relief and money damages are combined. She further realizes that she is dependent on the good offices of this Court for relief. But the facts of her case present a compelling claim for relief, and give this Court an ideal opportunity to create much needed uniformity as to the scope of "justiciability" when a court reviews the decision of a military correction board.

II. Even if this Court finds that 28 U.S.C. § 1500 is constitutional, under the unique facts and procedures of this case, equitable tolling of the statutory filing period against the United States should be granted to the petitioner.[2]

A. 28 U.S.C. § 1500 does not bar the doctrine of equitable tolling in relation to 28 U.S.C. § 2501.

The court below in its opinion of May 9 reiterated that the Federal Circuit has "declined to decide whether equitable tolling applies with respect to 28 U.S.C. § 2501." 2005 WL 1076707 at *2; *see also Martinez v. United States*, 333 F.3d 1295, 1318 (Fed. Cir. 2003). Captain Holloway's case provides this Court

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2. The Federal Circuit below stated that Holloway's equitable tolling argument was raised for the first time on appeal and was therefore waived. However, this Court may still reach the issue. Appellate courts are fully empowered to hear issues that were not raised below. As Justice Scalia once stated, "the refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary." *Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J. concurring).

Thus, as an exercise of discretion, appellate courts may hear issues that were not presented at trial. *Singleton v. Wulffe*, 428 U.S. 106, 121 (1976). Stated another way, there is no *per se* rule that appellate courts cannot hear an issue that was first asserted on appeal. The *Singleton* Court left no doubt on this issue, stating that,

> [t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeal, to be exercised on the facts of individual cases . . . Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below . . .

428 U.S. at 121 (1976). One such instance occurs where "injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

with an ideal opportunity to make clear an issue that has caused considerable vexation to litigants in the Court of Federal Claims. This Court may do so by expressly holding that equitable tolling principles apply to 28 U.S.C. § 2501.

1. This Court has indicated implicit approval for equitable tolling of 28 U.S.C. § 2501.

At times a court may use its equitable powers to declare the limitation period satisfied *de jure* if not *de facto*. This is known as equitable tolling. A rebuttable presumption exists that equitable tolling of a statute of limitations is available against the United States to the same extent allowable against private parties. *Irwin v. Veterans Admin.*, 498 U.S. 89, 94-96, 111 S. Ct. 453, 457, 112 L. Ed. 435 (1990). However, this remedy is sparingly applied and limited to extraordinary circumstances. *Id.* at 96.

This Court has, already, implicitly approved of equitable tolling of 28 U.S.C. § 2501. In *Irwin*, *supra*, this Court specifically found that once the Government waives its sovereign immunity, equitable tolling applies to suits against the Government to the same extent as applicable to suits against private parties. 498 U.S. at 95. In explaining this rationale, this Court compared the 30-day statute of limitations at issue in Irwin with 28 U.S.C. § 2501 and stated:

> In the present statute, Congress said that "within thirty days . . . an employee . . . may file a civil action. . . ." In *Soriano*, *supra*, (where 28 U.S.C. § 2501 was at issue) Congress provided that "every claim . . . shall be barred unless the petition . . . is filed . . . within six years . . ." An argument can undoubtedly be made that the latter language is more stringent than the former, but we are not persuaded that the

> difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling.

Irwin, 498 U.S. at 95.

This statement clearly indicates that this Court's approves of equitably tolling in cases involving 28 U.S.C. § 2501.

2. There is good reason to believe that Congress wanted equitable tolling to apply to 28 U.S.C. § 2501.

In the Court below, the government cited *United States v. Brockamp*, 519 U.S. 347, 117 S. Ct 849, 136 L. Ed. 2d 818 (1997) in support of its claim that Congress intended to foreclose equitable tolling in respect to 28 U.S.C. § 2501. Appellee's Br. in the Fed. Cir. at 14. If anything, however, *Brockamp* indicates that *Congress wanted equitable tolling to apply to 28 U.S.C. § 2501.*

In *Brockamp*, several taxpayers over paid their taxes, applied for refunds after the relevant statute of limitations had passed, and asked the court to excuse the untimely filing under the equitable principles announced in *Irwin*, *supra*. 519 U.S. at 348. This Court found that equitable tolling did not apply, distinguishing *Irwin* for two reasons:

First, unlike *Irwin's* simple 30-day limit, the statute at issue "uses language that is not simple. It sets forth its limitations in a highly detailed technical manner, that linguistically speaking, cannot easily be read as containing implicit exceptions. Moreover, § 6511 (the limitation statute at issue) reiterates its limitations several times in several different ways." 519 U.S. at 350-51. For example, § 6511 states that a:

> "[c]laim for . . . refund . . . of any tax . . . shall be filed by the taxpayer within 3 years from the time

> the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed . . . within 2 years from the time the tax was paid." 26 U.S.C. § 6511(a).

It then says that

> "[n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed . . . unless a claim for . . . refund is filed . . . within such period." § 6511(b)(1).

It reiterates the point by imposing substantive limitations:

> "If the claim was filed by the taxpayer during the 3 year period . . . the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. . . ." § 6511(b)(2)(A).

And

> "[i]f the claim was not filed within such 3 year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim." § 6511(b)(2)(B).

519 U.S. at 351.

Second, this Court found that the statute at issue had detailed exceptions to its limitation period and "those very specific exceptions do not include 'equitable tolling.'" *Id.* For example:

> See § 6511(d) (establishing special time limit rules for refunds related to operating losses, credit carrybacks, foreign taxes, self employment taxes,

> worthless securities, and bad debts); see also *United States* v. *Dalm*, 494 U.S. 596, 610 (1990) (discussing mitigation provisions set forth in 26 U.S.C. §§ 1311-1314); § 507 of the Revenue Act of 1942, 56 Stat. 961 (temporarily tolling limitations period during wartime).

519 U.S. at 351-52.

Because of these differences with the limitation period at issue in *Irwin*, this Court held that:

> [t]o read an "equitable tolling" provision into these provisions, one would have to assume an implied exception for tolling virtually every time a number appears. To do so would work a kind of linguistic havoc . . . Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together indicate to us that Congress did not intend courts to read other unmentioned, open-ended, "equitable" exceptions into the statute that it wrote. There are no counter-indications. Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.

519 U.S. at 352.

Further, this Court found that the sheer magnitude of refunds processed by the IRS—over 90 million a year—indicates that Congress did not intend to make equitable tolling available to the tax payers. *Id.* This Court found that equitable tolling in such cases "could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, might turn out to lack sufficient equitable justification." *Id.*

In the instant case, 28 U.S.C. § 2501, much like the statute at issue in *Irwin*, has a very simple, non-technical limitation period:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues...

Unlike the tax statute in *Brockamp*, 28 U.S.C. § 2501 has no hyper-complicated steps to master. Nor are there multiple iterations of the limitation period. 28 U.S.C. § 2501 simply states the time in which a plaintiff must bring suit in the Court of Federal Claims. Further, and also unlike the statute in *Brockamp*, 28 U.S.C. § 2501 contains only two exceptions (disability or being beyond the sea—both traditional equitable grounds). Compare this to the host of exceptions found in *Brockamp* (special time limits for refunds related to operating losses, credit carrybacks, foreign taxes, self employment taxes, worthless securities, bad debts—definitely not traditional equitable grounds). Finally, compare the millions of tax refund cases that could have asked for equitable tolling under *Brockamp* with the relatively few plaintiffs who would qualify for equitable tolling under 28 U.S.C. § 2501.

Thus, the foregoing indicates that where the statute of limitations is simple, contains few exceptions, and tolling would benefit relatively few plaintiffs, it is reasonable to conclude that Congress intended to allow equitable tolling of that statute. Being just such a statute, 28 U.S.C. § 2501 should be subject to equitable tolling.

3. The unique factual and procedural posture of this case entitles the petitioner to equitable tolling of 28 U.S.C. § 2501.

When Holloway's claim was dismissed by the Court of Federal Claims below, that Court's opinion relied heavily on *U.N.R. Industries Inc. v. United States*, 962 F.2d 1013, 1021 (Fed. Cir. 1992) ("UNR III) for its understanding of § 1500 and indicated that the Supreme Court upheld this interpretation in *Keene Corp. v. United States*, 508 U.S. 200, 113 S. Ct. 2035 (1993). Thus, according to the claims court below, if there were a claim or process pending in another court while Holloway filed a claim in the Court of Federal Claims, the claims court would not have jurisdiction over the suit.

Following denial of *certiorari* by this Court, Holloway re-filed her complaint in the Court of Federal Claims. This re-filing occurred 32 days after the expiration of the statute of limitations and less than 30 days after notice of the denial was received. For the majority of the limitation period, Holloway was actively pursuing her claim for declaratory relief, something vital for success on her case in the face of both a regulation and case law, notwithstanding the decisions by both the District Court and Ninth Circuit. The Opinions of the claims court and the Federal Circuit below gives little consideration to this fact. In fact, the Court's below seemed unconscionable in its indifference to this equitable issue.

In this case, Holloway's claim accrued on July 1, 1997, the date of her discharge from active duty. It was first filed in the Court of Federal Claims on December 3, 2002, and an immediate stay of that action was requested pending the Ninth Circuit's decision on en banc review of the claim. The Ninth Circuit declined *en banc* review. Holloway petitioned for certiorari, and that, too, was denied on Friday, June 27, 2003. Holloway re-filed her claim in the Court of Federal Claims on August 4,

2003, which was less than one month after Notice of said denial and 32 days past the six-year limitation period called for in 28 U.S.C. § 2501.

This brings into play the issue of the limitation period and equitable tolling.

Unfortunately, the Federal Circuit has not yet decided, and indeed has expressly declined to decide, "whether equitable principles may ever toll the statute of limitations period codified in § 2501." *Frazer v. United States*, 288 F.3d 1347, 1353 (Fed. Cir. 2002). However, in. *Catawba Indian Tribe of South Carolina v. United States*, 982 F.2d 1564, 1570-72 (Fed. Cir. 1993), the Court held that equitable tolling applies to 28 U.S.C. § 2501). Also, "depending on the facts of the particular case," *Frazer* at 1352, the Court of Federal Claims has applied equitable tolling principles to 28 U.S.C. § 2501. *See Araki v. United States*, 2004 WL 1949771 (Fed. Cl. 2004) (*c.f.* the underlying case, *Holloway v. United States*, 60 Fed. Cl. 254, 260, n. 12 (Fed. Cl. 2004), expressing doubt as to whether "this creature of equity" applies to § 2501).

In any event, and in spite of this confusion, Federal Circuit case law has allowed equitable tolling in two situations:

> Equitable tolling of statutes of limitations has been 'allowed . . . in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.'

Bonneville Associates,-Ltd. v. Barram, 165 F.3d 1360, 1365 (Fed. Cir. 1999) *quoting Irwin*, 498 U.S. at 96.

It is well settled that the timely filling of a complaint in an improper court can toll a statute of limitations (*see Irwin* at 97 fn 3, citing cases for this proposition: "*Burnett v. New York Central R. Co.*, 380 U.S. 424 (1965) (plaintiff timely filed complaint in wrong court); *Herb v. Pitcairn*, 325 U.S. 77 (1945) (same); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) (plaintiff's timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members"). The theme running through all of these cases is that plaintiffs, much like Holloway, who did not sleep on their rights but, in fact, vigorously pursued them are provided with relief notwithstanding a late filing.

Also, the claims court below did not consider its own authority. The Court of Federal Claims has, at times, rewarded a plaintiff's years long, dogged pursuit of compensation from the Government for money damages by allowing equitable tolling of 28 U.S.C. § 2501. In one case, practically on all fours with to Holloway's situation in its procedural posture, the Government had an easement to periodically flood the plaintiff's property. *George F. Miller Farms, Ltd. v. United States*, 27 Fed.Cl. 672 (Fed. Cl. 1993). By the early 80's, Government work on a nearby lake kept the property submerged for long periods of time. *Id.* The plaintiff alleged a Government taking due to this flooding and, in October of 1986, filed a claim in District Court. *Id.* at 673. One month later, the plaintiff filed the same claim, alleging the same operative facts, in the Court of Federal Claims. *Id.*

The Government moved to dismiss the Court of Federal Claims case under § 1500, but the case was suspended pending the District Court action. *Id.* The Government then moved to dismiss the District Court action, asserting that the proper forum was the Court of Federal Claims, and this motion was granted. While the Court of Federal Claims case was stayed, the Federal

Circuit's decision in *U.N.R. Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992), *aff'd sub. nom. Keene Corp. v. United States*, 508 U.S. 200 (1993), was decided. Based on these cases, the Court of Federal Claims concluded that it had no jurisdiction over the stayed action, and the plaintiffs voluntarily dismissed the case. *Miller Farms* at 673. After the dismissal, the plaintiff re-filed in the Court of Federal Claims stating the same claim. The Government then moved to dismiss under § 2501 because the taking allegedly occurred in the early 1980's, well over six years before.

The Court framed the issue in *Miller Farms* as "whether timely filing in this court of an action, which is later dismissed for lack of jurisdiction pursuant to § 1500, tolls the running of the limitations period applicable to a later action based on identical facts and legal theories." *Id.* at 673-674. The Court found that the facts of the case warranted equitable tolling. The "plaintiffs had filed a timely action in this court seeking precisely the same relief on the same legal theory" as the later untimely action. *Id.* at 676. In such a situation, "plaintiffs cannot be said to have slept on their rights, and the defendant cannot claim lack of notice during the statutory period." *Id.* (*citing Johnson v. Railway Express Agency*, 421 U.S. 454, 467, 95 S. Ct. 1716, 1723-24, 44 L. Ed. 2d 295 (1975) for the proposition that tolling due to a timely prior filing depends greatly on whether the later filing is based on the same cause of action).

The Court also found that the purpose served by the limitation period—fairness to opponents by not allowing stale claims—was not impeded where the relief asked for and the facts alleged were identical to an earlier filed, but jurisdictionally lacking, cause of action. *Miller Farms* at 676. The Court further found that the plaintiffs diligently protected their rights by voluntarily dismissing their Court of Federal Claims case once the *U.N.R.* decision was handed down and refilling six weeks later. *Id.*

Thus, the issue in Holloway's case is exactly the same as the issue in *Miller Farms*: "whether timely filing in [the Court of Federal Claims] of an action, which is later dismissed for lack of jurisdiction pursuant to § 1500, tolls the running of the limitations period applicable to a later action based on identical facts and legal theories." *Id.* at 673-674. Surely, for the claims court below to be consistent with *Miller Farms*, the answer must be "yes."

In Holloway's case, similar to *Miller Farms*, Holloway first filed a claim in District Court, asking for what that Court determined was essentially a claim for both back pay and retirement pay. When this claim was dismissed, she filed a back pay and retirement pay claim in the Court of Federal Claims, within the six-year limitation period, alleging that the Navy improperly denied her retirement under TERA. Then, faced with 28 U.S.C. § 1500, she voluntarily dismissed her Court of Federal Claims case, pending her appeal in the Ninth Circuit. After her appeal and her petition for *certiorari* were denied, Holloway immediately—within one week's time after she was notified—re-filed in the Court of Federal Claims, again asking for back pay and retirement pay, and again alleging that the Navy improperly denied her retirement under TERA.

The foregoing leads to the inescapable conclusion that Holloway has not slept on her rights; rather, she has pressed her claim vigorously for six years. The case was filed in the Court of Federal Claims within the six-year limitation period, asking for the same relief, so the defendant cannot claim prejudice due to lack of notice of the claim. Granting Holloway equitable tolling would be consistent with the established policy that while the purpose of limitation periods is to protect defendants from stales claims, this purpose "is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's

rights." *Miller Farms* at 676, *quoting Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49, 64 S. Ct. 582, 586, 88 L. Ed. 788 (1944).

Miller Farms should control the decision of the Court of Federal Claims below, and the decision of the courts below should be reversed on this basis.

B. The statute of limitations was tolled for the time that this case was first filed with the Court of Federal Claims.

Regardless of whether the limitation period should be equitably tolled on the particular facts of Captain Holloway's case—a case virtually identical in its procedural facts to the facts in *Miller Farms*, *supra*—the limitation period in this case was at the very least tolled for the time that it was actually filed with the Court of Federal Claims. Holloway's claim was first filed with the Court of Federal Claims from December 2, 2002 until January 27, 2003, when the plaintiff voluntarily dismissed the case—a total of 54 days. While no precedent has been found where a case has been filed, withdrawn, and later re-filed after the limitation period, but before the expiration of the additional time for the period the case had been previously filed, in *Rummell v. Ehle*, N.D. Ind., No. 1:04-CV-52 (Aug. 13, 2004) at page 5, this issue was raised, but was not discussed or resolved by the court.

However, logic dictates that the statute of limitations in a suit cannot run while that suit is actually filed with the court. This period of actual filing is analogous to the extension of filing time granted for a period of mental incompetence. Although a high degree of proof showing that a plaintiff's mental condition prevented the filing, the effect is that the statute is extended or equitably tolled for the length of time that the mental

incompetence prevented filing the complaint. *Smith v. Shared Medical System*, E.D. Pa. # 02-8372 (July 22, 2004) at page 11.

Captain Holloway now urges this Court to decide that while a cause of action is actually filed with the Court of Federal Claims, the limitation period does not run against that cause of action, and if the suit is withdrawn and later re-filed, the limitation period must extended to encompass the time in which the case was actually filed with the Court of Federal Claims. In Holloway's case, this would add 54 days to the limitation period and would mean that her re-filing with the Court of Federal Claims on August 4, 2003 was timely.

C. The statute of limitations was tolled for the time that plaintiff was awaiting notification of an earlier filed request for certiorari by this Court.

On April 30, 2003, Holloway petitioned this Court for a writ of *certiorari* requesting reversal of the Ninth Circuit's affirmance of the District Court's decision of October 11, 2002. While this Court denied the petition on June 27, 2003, Captain Holloway and her counsel were not informed of the denial until late July. Upon notification, Holloway immediately re-filed her complaint with the Court of Federal Claims, but the statute of limitations expired on Monday, July 1, 2003.

It could be argued that this delay in notifying Holloway of the denial of her petition violated the Court's own Rules. In relevant part, Supreme Court Rule 16.3 states that "[w]henever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify *forthwith* counsel of record . . ." (emphasis added).

While neither Supreme Court precedent, nor Supreme Court Rules defines "forthwith" in regard to the timeframe in which the Clerk must notify counsel of record, in common legal usage "forthwith" means "[i]mmediately; without delay; directly;

within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch." *Black's Law Dictionary*, 5th Ed. (1979).

It is also notable that Justice Thomas, in his dissent in *Henderson v. United States*, 517 U.S. 654 (1996) cited *Black's* definition with approval, stating:

> Although we have never undertaken to define "forthwith" as it is used in the SAA (the Suits in Admiralty Act) it is clear that the term "connotes action which is immediate, without delay, prompt, and with reasonable dispatch." *Amella v. United States*, 732 F.2d 711, 713 (C.A. 9, 1984).

Further, the Supreme Court has indicated approval of a dictionary definition of "forthwith," stating that:

> 'forthwith' is defined by Bouvier as indicating that 'as soon as by reasonable exertion, confined to the object, it may be accomplished. This is the import of the term; it varies, of course, with every particular case.' In matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours. Anderson (Law. Dict.) says of the word that it 'has a relative meaning, and will imply a longer or shorter period, according to the nature of the thing to be done.'

Dickerman v. Northern Trust Co., 176 U.S. 181 (1900).

The delay by this Court in notifying Holloway of the denial of her petition had a direct correlation to her running afoul of the limitation period. Simple fairness demands that this Court correct this situation and extend the time for Holloway to file her claim with the Court of Federal Claims.

CONCLUSION

For the reasons expressed above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED MAY 9, 2005

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 04-5103

SALLIE B. HOLLOWAY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: May 9, 2005

Before SCHALL, *Circuit Judge*, ARCHER, and PLAGER, *Senior Circuit Judges*.

SCHALL, *Circuit Judge*.

DECISION

Sallie B. Holloway appeals from the final decision of the United States Court of Federal Claims that dismissed her complaint for lack of jurisdiction on the ground that it was not filed within the six-year limitations period of 28 U.S.C. § 2501. *Holloway v. United States*, 60 Fed. Cl. 254 (2004) (*"Final Decision"*). We *affirm*.

Appendix A

DISCUSSION

I.

The pertinent facts are not in dispute. During the relevant period of time, Ms. Holloway was a United States Naval Reserve Officer. She served on active duty as a Reserve Canvasser Recruiter ("CANREC") until she was involuntarily discharged from active duty on July 1, 1997. At that time, she had accumulated just over fifteen years of active-duty service. Five months prior to her discharge, Ms. Holloway requested early retirement under the Temporary Early Retirement Authority ("TERA") program, § 4403, Pub. L. No. 102-484, 106 Stat. 2315, 2702 (1992), as amended by Pub. L. No. 104-106, § 1504(c)(3), 110 Stat. 514 (1996). Under the TERA program, Reserve officers with the necessary time in active-duty service have the option of early retirement. On March 24, 1997, the Navy denied Ms. Holloway's request for early retirement on the ground that as a CANREC with less than eighteen years of active-duty service, she did not qualify for TERA.

Ms. Holloway applied to the Board for Correction of Naval Records ("BCNR") for review of the Navy's decision. On October 26, 1999, the BCNR denied her request for correction, finding that "the evidence submitted was insufficient to establish the existence of probable material error or injustice." *Final Decision,* 60 Fed. Cl. at 258. On March 21, 2000, Ms. Holloway filed a complaint in the United States District Court for the Northern District of California seeking correction of her records as well as back pay and allowances. The district court dismissed the

complaint for lack of jurisdiction, *Holloway v. Danzig,* No. C 00-0981 SBA (N. D. Cal. Oct. 19, 2000), noting that Ms. Holloway had an adequate remedy in the Court of Federal Claims. The Ninth Circuit affirmed the dismissal on January 31, 2001. *Holloway v. England,* 50 Fed. Appx. 836 (9th Cir. 2002) (table).

On December 3, 2002, Ms. Holloway filed a complaint in the Court of Federal Claims seeking money damages based upon her allegedly unlawful discharge from active duty on June 1, 1997. At the same time, she moved to suspend proceedings based upon the fact that she had filed a request for en banc review with the Ninth Circuit that was still pending. On December 13, 2002, the Court of Federal Claims judge to whom the case was assigned issued an order in which he notified the parties that under 28 U.S.C. § 1500, the court was "not permitted to consider law suits that have been filed in other courts." Ms. Holloway thereupon filed a motion, which the court granted, to voluntarily dismiss her complaint without prejudice.

On August 4, 2003, Ms. Holloway filed a second complaint in the Court of Federal Claims. In it, she asserted again the claim presented in the complaint she had filed on December 3, 2002. The government moved to dismiss the complaint for lack of jurisdiction on the ground that it was untimely. The Court of Federal Claims granted the government's motion. *Final Decision,* 60 Fed. Cl. 254. The court determined that the cause of action for Ms. Holloway's claim accrued on July 1, 1997, the date she was discharged from active-duty service in the Navy. Ms. Holloway's complaint was therefore time-barred, the court ruled, because

it was not filed in the Court of Federal Claims until August 4, 2003, more than six years after accrual of the statute of limitations. *See* 28 U.S.C. § 2501. The Court of Federal Claims rejected Ms. Holloway's argument that her complaint "merged" with the voluntarily dismissed December 3, 2002 complaint. The court explained that under 28 U.S.C. § 1500, the Court of Federal Claims did not have jurisdiction over the December 3, 2002 complaint, and, thus, the August 4, 2003 complaint could not "relate back" to the earlier complaint.

II.

We review the Court of Federal Claims' dismissal of Ms. Holloway's complaint for lack of subject matter jurisdiction de novo. *W. Co. of N. Am. v. United States,* 323 F.3d 1024, 1029 (Fed.Cir.2003).

We see no error in the decision of the Court of Federal Claims. It is undisputed that Ms. Holloway's claim accrued on July 1, 1997 when she was discharged from active duty. *See Martinez v. United States,* 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc) ("A cause of action cognizable in a Tucker Act suit accrues as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, *i.e.*, when 'all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money.'" (citations omitted)). Moreover, the statute of limitations was not tolled when Ms. Holloway pursued administrative remedies before the BCNR. *See id.* at 1312 ("[I]t is well-settled that the statute of limitations

for Tucker Act claims is not tolled by the claimant's exercise of his rights to seek permissive administrative review of his claim.").

On appeal, Ms. Holloway argues that 28 U.S.C. § 2501 should be equitably tolled because she actively pursued her claim for relief during the statute of limitations period—first, by filing suit in district court and second, by filing the December 3, 2002 complaint in the Court of Federal Claims.

The government argues, and we agree, that because Ms. Holloway raises her equitable tolling argument for the first time on appeal, the argument has been waived. *See Sage Prods., Inc. v. Devon Indus., Inc.,* 126 F.3d 1420, 1426 (Fed. Cir. 1997). As noted by the Court of Federal Claims, Ms. Holloway's counsel (different from her counsel on appeal) rejected application of the doctrine of equitable tolling, referring to it as "totally misplaced." *Final Decision,* 60 Fed. Cl. at 260 n. 12.

In any event, there is no merit to Ms. Holloway's equitable tolling argument. The Supreme Court has held that the same rebuttable presumption of equitable tolling applicable to suits against private defendants also applies to suits against the United States. *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 95-96 (1990). While equitable tolling is available at least in some actions against the government, in *United States v. Brockamp,* 519 U.S. 347, 350 (1997), the Court rejected application of the doctrine where the statute at issue, much like section 2501 here, contains explicit exceptions to its basic time limits, which exceptions do not

include equitable tolling.[1] We have declined to decide whether equitable tolling applies with respect to 28 U.S.C. § 2501. *Martinez,* 333 F.3d at 1318. However, assuming equitable tolling were available under section 2501, Ms. Holloway has not made a sufficient showing to invoke the doctrine in this case. *Irwin* makes clear that equitable tolling against the federal government is available only when there is a compelling justification for delay, such as "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." 498 U.S. at 96. Ms. Holloway's arguments do not meet this standard.[2]

For the foregoing reasons, the final decision of the Board is affirmed.

Each party shall bear its own costs.

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1. Section 2501 provides that a "petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases." 28 U.S.C. § 2501.

2. We have considered Ms. Holloway's other arguments and have found them to be without merit.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS DATED APRIL 6, 2004

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No.: 03-1821C
April 6, 2004

RCFC 12(b)(1); Motion to Dismiss for Lack of Jurisdiction; 28 U.S.C. §§ 1501 and 2501; Pending Cases; Statute of Limitations

SALLIE B. HOLLOWAY,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

J. Byron Holcomb, Attorney at Law, Bainbridge Island, Washington, for the plaintiff.

Richard P. Schroeder, Commercial Litigation Branch, Civil Division, United States Department of Justice, for the defendant.

Appendix B

OPINION AND ORDER

Block, *Judge*.

This action is brought by an officer in the United States Naval Reserves ("USNR") who claims that the United States Navy ("Navy") unlawfully discharged her from active duty military service. Plaintiff, Captain Sallie B. Holloway, seeks a correction of her military records so that she may retire as an active duty Naval officer with the appropriate backpay, allowances, and benefits. Before this court is defendant's motion to dismiss pled in the alternative pursuant to either Rule 12(b)(1) or Rule 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC"). As will be fully explained below, because this court is without jurisdiction to hear the claim, the court has no alternative but to grant defendant's RCFC 12(b)(1) motion.

I. The Standard of Review and Applicable Law

The peculiar facts of this case mandate that the court center on the proffered RCFC 12(b)(1) motion[1] simply

1. A party can move to dismiss a claim under RCFC 12(b)(1) when the court lacks subject matter jurisdiction. RCFC 12(b)(1). Subject matter jurisdiction addresses the court's "general power to adjudicate in specific areas of substantive law." *Palmer v. United States,* 168 F.3d 1310, 1313 (Fed.Cir.1999). This court, furthermore, *shall* dismiss an action "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter." RCFC 12(h)(3). The court is "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke v. United States,* 60 F.3d 795, 797 (Fed. (Cont'd)

because there exists a serious question, as we shall see, of whether plaintiff's counsel was even aware of two procedural statutes that condition the waiver by the United States of its sovereign immunity under this court's jurisdictional statute—the Tucker Act.[2] In any event, failure to abide by these procedural requirements would render the present action stale. It is well accepted that the United States "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood,* 312 U.S. 584, 586 (1941). The government, furthermore, must unequivocally express its consent in a clear statement waiving sovereign immunity. *United States v. White Mt. Apache Tribe,* 537 U.S. 465, 472 (2003).

(Cont'd)

Cir. 1995). A plaintiff, however, as the non-moving party bears the burden of establishing jurisdiction by preponderant evidence. *United States v. Hays,* 515 U.S. 737, 743 (1995) (citing *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 189; *Warth v. Seldin,* 422 U.S. 490, 518 (1975)); *Reynolds v. Army & Air Force Exch. Serv.,* 846 F.2d 746, 748 (Fed.Cir.1988).

2. The Tucker Act, 28 U.S.C. § 1491(a)(1), in part provides that:

> [t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Appendix B

The Tucker Act operates as a waiver of sovereign immunity for non-tort suits against the United States premised on the Constitution, a statute or regulation, or either an express or implied contract with the United States. *See* 28 U.S.C. § 1491(a)(1); *United States v. Testan,* 424 U.S. 392, 397 (1976). Nevertheless, the Tucker Act does not create a substantive right enforceable against the United States for money damages; it merely confers jurisdiction on this court whenever that substantive right exists. *Testan,* 424 U.S. at 398 (*citing Eastport S.S. Corp. v. United States,* 178 Ct.Cl. 599, 372 F.2d 1002, 1007-1009 (1967)). Consequently, a plaintiff must premise its claim on a separate statute or regulation permitting recovery. *Id.; Rinner v. United States,* 50 Fed.Cl. 333, 335 (2001).

The first procedural condition on the Tucker Act waiver is its six year statute of limitations. 28 U.S.C. § 2501.[3] The statute of limitations operates as an express limitation on the Tucker Act's waiver of sovereign immunity, and may not be waived by either the court or the parties. *Forman v. United States,* 329 F.3d 837, 841-42 (Fed. Cir. 2003) (*citing Soriano v. United States,* 352 U.S. 270, 273 (1957); *Hart v. United States,* 910 F.2d 815, 817 (Fed. Cir. 1990)); *Alder Terrace, Inc. v. United States,* 161 F.3d 1372, 1377 (Fed. Cir. 1998). This six-year time limit is thus jurisdictional and filing within the six-year period is "a condition of the waiver of sovereign immunity in the Tucker Act . . . ." *Caguas Cent. Fed. Sav. Bank v. United States,* 215 F.3d 1304, 1310 (Fed. Cir. 2000).

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3. 28 U.S.C. § 2501 reads: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six-years after such claim first accrues."

In other words, § 2501 is an essential element a plaintiff must satisfy to avail himself of the Tucker Act's waiver of sovereign immunity. *S. Cal. Fed. Sav. & Loan v. United States,* 52 Fed.Cl. 444, 452 (2002).

The decisive factor in determining when a limitations period runs is when a claim first accrues. Accrual occurs when all events that fix government liability and entitle the claimant to institute an action arise. *See Alder Terrace, Inc.,* 161 F.3d at 1377 (*citing Kinsey v. United States,* 852 F.2d 556, 557 (Fed. Cir. 1988); *Hopland Band of Pomo Indians v. United States,* 855 F.2d 1573, 1577 (Fed. Cir. 1988)). This is in contradistinction to some hypothetical later time when "a claimant becomes certain he can prevail on the merits." *Cristina Inv. Corp. v. United States,* 40 Fed.Cl. 571 (1998) (*citing State of Alaska v. United States,* 32 Fed.Cl. 689, 698 (1995)). The Federal Circuit has held that in military pay cases—and the parties in this case are in agreement as to the law here[4]—the cause of action accrues, and statute of limitations starts to run, on the date of discharge from the military. *See Martinez v. United States,* 333 F.3d 1295, 1312 (Fed. Cir. 2003) ("[I]t is well-settled that the statute of limitations for Tucker Act claims is not tolled by the claimant's exercise of his rights to seek permissive administrative review of his claim.").

The second procedural condition to Tucker Act claims brought in the Court of Federal Claims is 28 U.S.C. § 1500, which precludes the court from exercising jurisdiction over

4. At oral argument, both parties agreed *Martinez* dictated that plaintiff's claim accrued on July 1, 1997, the date of her discharge from active duty. *See* Tr. of Oral Arg. at 7:13-16; 8:12-17.

"any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States. . . ." By its terms, § 1500 prohibits filing and prosecuting the same claims against the United States in two courts at the same time. 28 U.S.C. § 1500. This proscription, furthermore, coincides with the fundamental principle that a court must determine its jurisdiction at the time a plaintiff files the complaint. *Keene Corp. v. United States,* 508 U.S. 200, 207 (1993) (citations omitted); *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 830 (1989). The Court of Federal Claims, therefore, may not exercise its jurisdiction over a claim if, at the time of filing, a claim is pending in any other court based on the same operative facts and requesting essentially the same relief. *Loveladies Harbor, Inc. v. United States,* 27 F.3d 1545, 1550-52 (Fed. Cir. 1994); *Bailey v. United States,* 46 Fed.Cl. 187, 195 (2000).

In this case, plaintiff requests this court to order the Navy to correct her military records so that she may retire as an active duty Naval officer with attendant backpay, allowances, and benefits. The relief is premised on two other statutes, 10 U.S.C. § 1552[5] and 37 U.S.C. § 204,[6] which plaintiff

5. 10 U.S.C. § 1552, CORRECTION OF MILITARY RECORDS, empowers the Secretaries of the armed services to correct the service records according to procedures established by the Secretaries and "acting through boards of civilians of the executive part of that military department."

6. 37 U.S.C. § 204, Entitlement, BASIC PAY AND ALLOWANCES OF THE UNIFORMED SERVICES, outlines the financial entitlements of active duty and reserve personnel of the uniformed services.

argues entitles her to a correction of her military service records and an active duty retirement under the Navy's Temporary Early Retirement Authority ("TERA").[7] Pl.'s Compl. at 2, ¶ 5; at 4, ¶ 8. The relief here sought clearly falls within the ambit of the Tucker Act. *See Holley v. United States,* 124 F.3d 1462, 1466 (Fed. Cir. 1997) ("It is no longer subject to debate whether a Tucker Act claim may be stated for military back pay and ancillary relief. The Court of Federal Claims, like the Court of Claims before it, has jurisdiction of such claims."). The nature of plaintiff's prayers for relief, therefore, makes this court the appropriate forum to adjudicate her claims.

The primary issue here is whether the action before the court is time-barred. The complaint in this action was filed on August 4, 2003, more than six years after the claim accrued, which both parties agree was on or about July 1, 1997. However, that is not the end of the story. This is where 28 U.S.C. § 1500 and various proceedings filed in diverse forums come into play.

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7. Congress codified TERA in the National Defense Authorization Act for Fiscal Years 1992 and 1993 as Pub.L. 102-484, § 4403(a), 106 Stat. 2315, 2702, as amended by Pub.L. 104-106, § 1504(c)(3), 110 Stat. 514 (10 U.S.C. 1293 note) (1996). TERA provides the Secretary of Defense with a "temporary additional force management tool with which to effect the drawdown of military forces during the active force drawdown period." Pub.L. 102-484, § 4403(a), 106 Stat. 2315, 2702, as amended by Pub.L. 104-106, § 1504(c)(3), 110 Stat. 514 (10 U.S.C. 1293 note) (1996). TERA empowers the secretaries of the separate services during a period of active force drawdown to allow officers with 15 years of active duty service to retire with the same pay and benefits as an officer with 20 years of active duty service. *Id.*